

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE LOVELL HOWELL,

Defendant-Appellant.

UNPUBLISHED

October 24, 2006

No. 264583

Kent Circuit Court

LC No. 04-010221-FC

Before: Cavanagh, P.J., Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals of right from his conviction of armed robbery, MCL 750.529, and his enhanced sentence of 10 to 50 years' imprisonment as a third habitual offender, MCL 769.11. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the prosecutor violated defendant's right to due process by arguing facts not in evidence during rebuttal argument. We disagree.

We review claims of prosecutorial misconduct concerning improper remarks on a case-by-case basis to determine if, when considered in context, the prosecutor's comments denied the defendant a fair and impartial trial. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). Where, as here, the defendant fails to object to the prosecutor's remarks, appellate review is forfeit unless the defendant establishes outcome-determinative plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id.*

In the course of his closing argument, defense counsel commented on the prosecutor's failure to produce a listed witness at trial, and asked why that witness would have had the victim's cell phone. In rebuttal argument, without objection, the prosecutor responded to the defense counsel's comments by speculating that defendant took the cell phone as an afterthought to prevent the victim from calling anyone, and that he gave it to the witness because he did not need or want a cell phone that could link him to the robbery.

Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659

(1995). The prosecutor's comments are evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The prosecutor's comments were responsive to defendant's arguments and were fair inferences from the evidence. A prosecutor's responsive comments are generally not regarded as error requiring reversal. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Furthermore, the trial court instructed the jury that the remarks of counsel were not evidence. In the absence of an objection or a request for a specific curative instruction, the court's admonition was sufficient to dispel any prejudicial effect. *Bahoda, supra* at 281.

Defendant next argues that his trial counsel failed to provide effective assistance by failing to object to the prosecutor's comments and by failing to request that the court instruct the jury with the "missing witness" instruction. CJI2d 5.12. We disagree.

To establish that counsel failed to provide effective assistance, the defendant must "show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). "The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy." *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). Because no evidentiary hearing was requested or conducted on this issue, our review is limited to errors apparent on the existing record. *Id.* at 385.

With regard to the failure to object to the prosecutor's comments, we have concluded that the comments were proper; therefore, any objection would have been futile. Counsel was not required to make a futile objection. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Regarding counsel's failure to request a "missing witness" instruction, a defendant may be entitled to this instruction when the trial court determines that the prosecutor listed a witness for production at trial and failed to produce the witness or seek leave of the court to excuse the witness for good cause. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003); *People v Cook*, 266 Mich App 290, 293 n 4; 702 NW2d 613 (2005); *People v Eccles*, 260 Mich App 379, 389 n 7; 677 NW2d 76 (2004). "The inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000), citing *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000). "The test [of due diligence] is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good faith efforts were made to procure the testimony, and not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

Based on the police officer's description at trial of his efforts to locate the missing witness, we are convinced that the prosecutor demonstrated due diligence and that defendant would not have been entitled to the "missing witness" instruction even if defense counsel had requested it. Moreover, we note that the defense counsel informed the jurors that they could

consider the prosecutor's failure to produce the witness in making their decision, and the prosecutor agreed that "to the extent [the witness's] absence creates a reasonable doubt, it does fall on me."

Defense counsel apparently made the reasonable decision that the prosecutor's efforts to locate and produce the missing witness constituted due diligence, and that a formal request for the "missing witness" instruction would be unavailing. There is a strong presumption that counsel provided effective assistance and that his decisions were based on reasonable trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). The failure to make a futile request, as with the failure to make a futile objection, does not establish ineffective assistance of counsel. *Snider, supra* at 425. We presume that counsel decided that his admonition to the jury, combined with the prosecutor's agreement, was the best way to address the missing witness issue. We conclude that defendant has failed to overcome the strong presumption that his trial counsel provided effective assistance.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens